

OGC REVIEW COMPLETED

19 November 1976

MEMORANDUM FOR THE RECORD

SUBJECT : OGC Memorandum on FLSA

REFERENCE: Memo for Dep/GC fr [] dtd 22 Sep 76,
subj: Letter from F.W.M. Janney re Fair Labor
Standards Act Implementation (OGC 76-5414)

STATINTL

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I have discussed reference memorandum with [] the originator. He advises that it only presents an arguable position and was written with that in mind. He is aware the Civil Service Commission does not consider us exempt from the provisions of the FLSA overtime regulations, and the weight of opinion in the OGC is that we would lose in a court case.

They apparently considered asking for exemptions for certain offices or people under the umbrella of our special operational requirements, but the fact that the FLSA rules don't apply to overseas stations, the idea was discarded.

[]

Chief, Review Staff

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Next 2 Page(s) In Document Exempt

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21 OCT 1976

MEMORANDUM FOR: Deputy Director of Personnel

FROM : [REDACTED]
Deputy Director of Personnel
for Plans and Control

SUBJECT : Applicability of the Fair Labor Standards Act
Amendments of 1974 to CIA

REFERENCE : Memo for Dep/GC fr [REDACTED] dtd 22 Sep 76
subj: Letter from F.W.M. Janney re Fair Labor
Standards Act Implementation

1. In referenced memo, [REDACTED] (OGC) has expressed an opinion to the Deputy General Counsel that it is "perhaps advisable for the Agency to adopt the position that it is arguable whether, as a matter of law, we are included within the provision of the FLSA." [REDACTED] opinion is related to an OP memorandum dtd 22 Jun 76 to the Deputy Directors relative to FLSA implementation wherein we say "must by law comply." STATINTL

2. The FLSA amendments of 1974 were signed into law (P.L. 93-259) by the President on 8 April 1974. A review of the published amendments at that time by P&C/OP indicated that the provisions of the new Public Law applied to all Federal agencies and employees. At a special meeting of the CSC/Interagency Advisory Group held on 18 April 1974, Mr. Rosen, the Executive Director, CSC, conducted a briefing on the FLSA and specifically stated that all Federal agencies (AEC, CIA, etc.) were included under the Act with the CSC charged with the responsibility for administering the FLSA for the Federal sector.

3. On 22 April 1974 a meeting was set up by Mr. Harold Brownman with the D/Pers and Mr. John Warner, General Counsel, to discuss FLSA. I attended this meeting and recall (there are no notes of record for the meeting) that we advised Harold Brownman of the CSC's briefing on FLSA and their interpretation that all Federal agencies were subject to these new amendments. I further recall that John Warner confirmed to Mr. Brownman that the Agency was subject to the amendments.

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4. Upon receipt of [] referenced memo of 22 Sep 76, P&C searched our "FLSA" records but could not find any written documentation from OGC relative to John Warner's legal opinion that the Agency was subject to provisions of the FLSA amendments. I contacted [] (OGC) who confirmed that John Warner had orally confirmed that CIA was subject to the provisions of the FLSA amendments but had never issued a written opinion.

[] STATINTL

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OGC 76-5414
22 September 1976

MEMORANDUM FOR: Deputy General Counsel

FROM:

Office of General Counsel

SUBJECT: Letter from F.W.M. Janney re Fair Labor
Standards Act Implementation

1. This is in response to your penned note on the input menu to subject correspondence questioning whether the CIA is subject to all the provisions of the FLSA.

2. The 1974 amendments to the FLSA (Pub. L. 93-259), effective 8 April 1974, expanded the scope of the definition of employee by amending 42 U.S.C. 203(e)(2)(A) to include

Any individual employed by the Government of the
United States

* * *

(ii) in an executive agency as defined in section
105 of such title.

CIA, an independent establishment, falls within the definition of "executive agency" as defined in 5 U.S.C. 105.

3. I have examined the basic Act and the amendments and found no specific or general language which would exempt the Agency from its provisions. Such exemption would, therefore, have to flow from the Agency's own statutory authorities.

4. [] in his memorandum on the CIA Policy on Overtime Compensation (OGC 74-2338), raised the argument that the statutory rules of construction present a convincing case for arguing that the Agency, by virtue of its special act, is not subject to the Pay Act. Further, he suggested, though did not rule, that the FLSA would similarly have no effect upon the Agency's pay authority. This argument is based on the canon of statutory construction that a later statute, general in terms and not expressly repealing

considered as not intending to affect the specific or special provisions of the earlier statute, unless that intention to effect a repeal is manifested or implied by the irreconcilability of the continued operation of both.

5. As a matter of policy, however, the Agency has indicated that it will try and conform to those applicable wage provisions and benefits applicable to all other Federal employees. Thus, while as a matter of law it is arguable that the Agency need not comply specifically with every provision of the FLSA, the Agency has elected, as a matter of policy, to comply with the benefits and entitlements generally applicable to all Federal employees except where the unique functions of the Agency make such a practice impractical.

6. With reference to Mr. Janney's memorandum, one could, based upon the discussion above, take issue with his use in paragraph 2 of the phrase, "must by law comply." It is perhaps advisable for the Agency to adopt the position that it is arguable whether, as a matter of law, we are included within the provision of the FLSA. The undersigned will discuss this matter with Mr. Janney or his representatives if you so desire.

STATINTL



cc: D/Personnel

MEMORANDUM FOR: Deputy Director for Administration
Deputy Director for Intelligence
Deputy Director for Operations
Deputy Director for Science & Technology
Executive Secretary, Office of the DCI

FROM : F. W. M. Janney
Director of Personnel

SUBJECT : Fair Labor Standards Act Implementation

REFERENCE : Fair Labor Standards Amendments of 1974

STATINTL

1. The Office of Personnel has for some months been making a major effort to comply with revised instructions for applying the provisions of the Fair Labor Standards Act. The underlying concepts of FLSA are intended as remedial social legislation designed to assure workers of an adequate living wage, prohibit age discrimination, ensure equal pay regardless of sex, prohibit the use of child labor and discourage the use of an employee's time if compensation is not intended (overtime provisions).

2. The Central Intelligence Agency is not exempt from the provisions of FLSA and must by law comply. The Civil Service Commission (CSC) is empowered to oversee and inspect Agency compliance and employees may complain or appeal directly to the CSC or the Federal District Courts without consultation within CIA. It is extremely important, therefore, that we comply to the fullest in order to keep appeals and complaints to a minimum.

3. Our immediate concerns are with the compliance of the overtime provisions of the Act. The instructions issued by the CSC in this area are extremely complex and we are finding that our base of information, primarily the position description, does not contain complete data of the kinds required. It has, therefore, become necessary that we request from your components supplemental information to existing position descriptions and, in a number of instances, complete new descriptions. I realize that these requests will place additional burdens on your components. However, we will endeavor to restrict our requests to only that information required to make the proper

determinations under the law. Although we will be contacting your components directly, I earnestly solicit your assistance in emphasizing to them the importance of FLSA compliance and their need to provide this office promptly with FLSA supportive data as requested.

(Signed) F. W. M. Janney

F. W. M. Janney

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